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IN THE

Supreme Court of the United States

October Term, 1965

No. 634

FOREMOST DAIRIES, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Foremost Dairies, Inc. ("Foremost") petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above case on July 14, 1965.

Opinions Below

There are three opinions below. The Initial Decision of the Hearing Examiner of the Federal Trade Commission, filed on August 30, 1962 and the Opinion of the Commission, filed on May 23, 1963, are not yet officially re-

ported. They are reproduced commencing at pages 10 and 34 respectively of the joint Printed Record filed with the Court of Appeals. The Opinion of the Court of Appeals, filed on July 14, 1965, not yet officially reported, is printed in Appendix A *infra*.

Jurisdiction

The order of the Court of Appeals was entered on July 14, 1965, and is printed in Appendix B *infra*, page 18a. The Final Decree of the Court of Appeals was entered on August 5, 1965 and is printed in Appendix C *infra*, page 19a. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 62 STAT. 928, 28 USC §1254(1) (1948).

Questions Presented

This petition raises the following significant questions concerning the proper interpretation of Section 2 of the Clayton Act, 38 STAT. 730 (1914), as amended by the Robinson-Patman Act, 49 STAT. 1526, 15 U.S.C. §13(a) (1936):

(1) Did the Court of Appeals err in holding that the "admittedly meagre" (p. 10a *infra*) evidence of competitive effect flowing from a single temporary price discrimination satisfied the requirements of the Robinson-Patman Act?

(2) Did the Court of Appeals err in holding that milk which is processed in Santa Fe, New Mexico, then trans-

ported to a branch plant in Albuquerque, New Mexico, and finally sold to retail stores in Albuquerque, New Mexico—crossing no state lines in the process—nevertheless is milk "purchased * * * in commerce" by the Albuquerque retailers merely because prior to processing some of the milk in its raw untreated and unprocessed form originated in Colorado before it was delivered in New Mexico to the processor?

Statute Involved

Section 2 of the Clayton Act, 38 STAT. 730 (1914), as amended by the Robinson-Patman Act, 49 STAT. 1526, 15 U.S.C. §13(a) (1936), which provides in pertinent part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *"

Statement of the Case

I. The History of the Litigation

Foremost is here seeking review of a "secondary-line" order under the Robinson-Patman Act prohibiting sales "to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the pur-

chaser paying the higher price" (R. 33)[1] This order has been imposed because of a temporary discount in the amount of 5% granted by the Foremost branch in Albuquerque, New Mexico, to one customer, Barber's Stores, in the same city.

At the outset this case had no connection with Albuquerque, New Mexico. It was commenced by the filing of a complaint on April 13, 1959 charging Foremost with unlawful price discrimination in its sales of milk in interstate commerce to different purchasers at the same level of trade in violation of Section 2(a) of the Robinson-Patman Act. The only localities specified as being among those where the allegedly unlawful discriminations occurred were Dallas, Waco, Forth Worth, Houston, Corpus Christi and "other cities, towns and places in the State of Texas." The complaint alleged injury to competition in both the primary and secondary lines (R. 4-5). Foremost's answer, dated June 14, 1959, denied *inter alia* that its sales were in commerce or that the requisite injury to competition had occurred or was reasonably probable (R. 7-9).

In the Fall of 1959 hearings in support of the complaint were conducted in Dallas and Corpus Christi, Texas. Commission counsel was then trying to prove a territorial or "primary-line" price discrimination case. The Examiner ultimately dismissed the primary-line charge and this finding was not appealed (R. 12-19, 34-35).

After the Texas hearings there were no further proceedings for a period of over two years until on December

1. "R." refers to the joint Printed Record filed with the Court of Appeals.

4, 1961 a hearing was held in Albuquerque, New Mexico, to inquire into matters which were nowhere specified in the original complaint. Here for the first time customer witnesses were called and an attempt made to prove a secondary-line case. Foremost opened its defense in Albuquerque and thereafter two additional defense hearings were held in Washington, D. C. Foremost rested its case and the record was closed on March 6, 1962.

As a result of the evidence adduced at these supplemental hearings, the Examiner found injury in the secondary-line and entered an Order on August 30, 1962. The Commission affirmed on May 23, 1963. The Court of Appeals affirmed the Commission on July 14, 1965.

II. The Facts

The milk which is sold in Albuquerque is first processed in the Foremost plant in Santa Fe, New Mexico. The Santa Fe plant obtains the bulk of its raw product from producers in New Mexico, but approximately 20% of the raw milk does originate in the State of Colorado (R. 46). The Record is silent as to the place where title to the raw milk passes to Foremost, but it is evident from the opinions of both the Commission and the Court of Appeals that their holdings would be the same even if it were proven that title passed to Foremost at the Santa Fe plant in the State of New Mexico (R. 36 n. 2; p. 6a *infra*).

At the Santa Fe plant the raw milk is first sampled and pumped into storage tanks. After it is placed in the tanks it is tested and, in combination with milk of different butterfat content, standardized to a uniform butterfat content.

It is then pasteurized, in some cases homogenized, bottled and cooled. After bottling it may be stored in a cold storage vault or loaded directly onto trucks for shipment to the Albuquerque branch operation. The Albuquerque branch is equipped with refrigeration equipment for the storage of the milk received and trucks for delivery to local customers. It does not supply any customers outside the State of New Mexico (R. 13, 46-47, 49-50, 53-54; p. 5a *infra*).[2]

On the basis of this evidence, the court below held that milk "passed in a steady flow from the farms in Colorado * * * to the shelves of retail grocery establishments in Albuquerque" (p. 7a *infra*). In order to uphold the Commission's Order, however, the court also had to find that the requisite adverse effect on competition had been demonstrated.

The Commission's Order, sustained by the Court of Appeals, is predicated upon a single discount granted temporarily to the Barber's Stores in Albuquerque. The discount was, as the Commission found, granted directly in response to local competitive conditions and abandoned when Foremost learned that its competitors had abandoned their discounts in the market (R. 39-40, 63-65, 67-70). Foremost does not urge the "meeting competition" defense here, however, but rather relies upon the absence of any substantial evidence of adverse competitive effect.

It is true, as the Court of Appeals found, that the discount to all of the Barber's stores in Albuquerque con-

2. The testimony on the mechanics of milk processing refers specifically to the Foremost plant in Dallas, but neither party has ever contended that the Santa Fe plant operated in a different manner (see p. 5a n. 4 *infra*).

tinued in effect for about two years and involved a total cash rebate of approximately $7600 (R. 73; p. 10a *infra*). However, this sum fails to provide a meaningful measure of the requisite competitive impact. A close examination of the Record demonstrates that the possible impact was *de minimus*, even in a business where profit margins are low and competition keen.

In an attempt to prove competitive effect, Commission counsel called six proprietors of retail grocery stores in Albuquerque. Only one of these witnesses (Conniff) testified that he competed with Barber's at all. At the time of the hearing Barber's operated seven stores in the City of Albuquerque. As can be seen from the City map (R. 77), only one of these stores (Barber's No. 4) is located in the vicinity of Mr. Conniff's store.[3] The other six are located on the other side of the City.

Although Conniff claimed that customers came from all over Albuquerque to buy his choice meats, there is no evidence that they came from all over the City to buy milk. In fact, Conniff did not claim that he competed with any Barber's store other than Barber's No. 4 in milk and dairy products (R. 57-58). There was no evidence that Barber's No. 4 or any of the other Barber's stores had ever reduced its prices on milk below those of its competitors. In fact, Mr. Conniff testified that he regularly undersold his chain-store competition (R. 58-59). Barber's No. 4 had been open for about one month prior to the date of the hearing and had been receiving a discount for even less time because all such discounts had been abandoned by the date

3. The stores of the Commission's witnesses are marked with an "X" on the map.

of the hearing (R. 54, 63, 67, 70). Since Conniff sold about $400 worth of Foremost milk each month, the failure to extend a 5% discount to him during this period of time conceivably disadvantaged his $1,000,000 a year business only in the amount of some $20 (R. 55-56, 60). This is the sum total of any possible adverse competitive effect arguable from the Record in this case.

Reasons for Granting the Writ

I. The Case Involves Issues of Fundamental Importance to the American Economy.

The decision of the Court of Appeals represents a significant extension of the reach of the Robinson-Patman Act. First, it dispenses with the need for any substantial evidentiary support for the finding of probable competitive injury in secondary-line cases. Second, it extends the application of the Statute to untold numbers of purely local business concerns which employ even minimal amounts of locally purchased raw materials which have moved at some time in interstate commerce. Any such extension of this Statute, with its powerful effect on competitive pricing, is of fundamental importance to the nation's economy and should be reviewed by this Court.

Although opinions differ drastically about the merits and failings of the Robinson-Patman Act, it must be recognized that the Act in some degree inhibits price competition. It was passed at a time when the country was experimenting with a semi-cartelized economy and it reflects certain of the economic precepts of the NRA legislation

which preceded it.[4] This Court has recognized that too broad an application of the Robinson-Patman Act could stultify competition in derogation of broader national policies. In *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 63 (1953), the Court warned against an overly broad interpretation of the Act which would:

> "* * * help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust litigation."

The opinion continued, 346 U. S. at 74:

> "* * * it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress."

It is submitted that the unduly broad application of the Act in this case poses a threat to competition similar to that which concerned the Court in *Automatic Canteen*. Although the Court of Appeals in this case expressly disclaimed any reliance on a *per se* rule condemning price discriminations in a secondary-line case (p. 13a *infra*), on the Record here the result reached is essentially indistinguishable. As outlined above, the only evidence in the record relating to competition in milk with the Barber's stores was the testimony of a single witness who stated that he competed with one Barber's store which had been open for less than a month before all discounts were abandoned. The assumption by the Court of Appeals (p. 16a *infra*) that the area of competition is wider, that "customers may often drive to relatively distant retail outlets if significant

4. See Rowe, Price Discrimination Under the Robinson-Patman Act 10-11 (1962); Edwards, The Price Discrimination Law 11-12 (1959).

price differences or alluring bonuses are made available," is entirely without record support.[5]

The most that can be inferred from the Record is that Mr. Conniff, who grosses about $1,000,000 a year, lost about $20 because Foremost did not give him a 5% discount on milk at the same time it was given to the one Barber's store nearby. A finding of probable competitive injury under these circumstances really is tantamount to a finding of such injury whenever there is a difference in price.

The court's finding on the commerce issue similarly represents a significant extension of the reach of the Statute. The discriminatory sales involved here were sales from a storage plant in New Mexico, supplied by a processing plant in New Mexico, to customers in New Mexico. They were found to be in commerce simply because a minor percentage of the raw milk delivered in New Mexico to the processing plant comes from Colorado cows. There is no showing that Foremost has any connection whatever with the raw milk while it is in Colorado; it is just a raw material which Foremost receives at its plant in New Mexico and employs in its processing operation.

The Court of Appeals has in effect held that the purely intrastate sales of Foremost were sales in commerce because a raw material had at some time crossed a state line. The application of this doctrine generally would mean that the Robinson-Patman Act could be applied to the local activities of almost any business in the country. It is submitted that this extension of the reach of the Act similarly should be reviewed.

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5. And, of course, there is no evidence at all that Barber's ever cut prices or offered bonuses on Foremost milk or any other product.

II. The Decision of the Court of Appeals is in Direct Conflict with Other Circuit Court Decisions.

The decision of the Court of Appeals on the issue of competitive injury is in direct conflict with the recent decision of the Seventh Circuit in *American Oil Company* v. *FTC*, 325 F. 2d 101 (7th Cir. 1963), *cert. denied*, 377 U. S. 954 (1964). Both this case and *American Oil* involved price concessions resulting directly from temporary competitive conditions. It is true as the court below pointed out (p. 14a *infra*), that the price concessions in *American Oil* lasted for only 17 days, while some of the discounts in this case lasted for two years. But there is no evidence whatever to support an inference of competitive injury based upon any discount other than the one granted to the new Barber's store which opened during the last month of that period. Prior to that last month the only Barber's stores were located in the Eastern portion of the City, remote from any of the complaining witnesses (R. 54, 77; see p. 15a *infra*). Thus, the period of time when there could conceivably have been any competitive impact in this case is of the same order of magnitude as was involved in *American Oil.* Moreover, in *American Oil* there was actual evidence of price cutting by the favored customer and loss of sales by unfavored customers—elements totally lacking in this case.

The court below in this case (p. 16a *infra*) stated that the "tone set by the Supreme Court" in *FTC* v. *Morton Salt*, 334 U. S. 37 (1948), required the affirmance of the FTC's inference of probable competitive injury. The Seventh Circuit Court of Appeals, however, confronted with more substantial evidence from which such an inference could be drawn, expressly distinguished *Morton Salt.* The

opinion pointed out that *Morton Salt* involved a discriminatory pricing *system* "which gave buyers of large quantities a built in, routine and permanent price advantage over smaller rivals," 325 F. 2d at 106. There is no evidence in this case that Foremost had a discriminatory pricing system; rather the evidence shows that after years of litigation and a number of false starts the Commission could challenge only a single discount granted in response to competitive conditions and promptly abandoned when competitive conditions changed.

In order to achieve clear understanding of and compliance with the law, this Court should determine whether the court below or the Seventh Circuit in *American Oil* has correctly applied *Morton Salt*.

The holding of the court below on the commerce issue is similarly at variance with the holdings of other Courts of Appeals. Prior to this case, a number of such courts had held that the interstate movement of raw materials comes to an end when they are received at the processing plan. In *Brosious* v. *Pepsi-Cola Co.*, 155 F. 2d 99, 103 (3rd Cir. 1946), the court held that the flow of interstate commerce ended at the plant where the soft-drink concentrate was compounded to make the bottled drink. See also *Ewing-Von Allmen Dairy Co.* v. *C and C Ice Cream Co.*, 109 F. 2d 898 (6th Cir. 1940), *cert. denied*, 312 U. S. 689 (1941) (ice cream); *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F. 2d 265 (7th Cir. 1961) (ice cream); *Lawson* v. *Woodmere*, 217 F. 2d 148 (4th Cir. 1954).

The court below, however, chose to rely on another line of authorities, chiefly involving interpretations of the commerce requirements of the Sherman Act, 26 STAT. 209

(1890), as amended, 15 U. S. C. §1 (1955), which are entirely different from those of the Robinson-Patman Act. *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), *cert. denied*, 373 U. S. 934 (1963). It distinguished *Brosious* and the other cases cited above on the ground that in this case the raw milk "was not altered materially by the processing in Santa Fe, and the milk was not warehoused for any appreciable length of time before shipment" (p. 7a n. 6 *infra*). It is submitted that the distinction between the amount of alteration involved in converting concentrated Pepsi-Cola into bottled Pepsi-Cola, for example, and the amount involved in converting raw milk into processed milk, is a tenuous one indeed. The authorities are fundamentally in a state of conflict which this Court should undertake to resolve.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

Opinion

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20726

FOREMOST DAIRIES, INC.,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of an Order of the Federal Trade Commission

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(July 14, 1965.)

Before TUTTLE, Chief Judge, and GEWIN, Circuit Judge, and McRAE, District Judge.

GEWIN, Circuit Judge: The petitioner, Foremost Dairies, Inc., is a processor, manufacturer, distributor, and retailer of dairy products in interstate commerce. As of

June 1959, it owned and operated 59 processing plants in 24 states and maintained 182 sales, receiving and distribution facilities in 29 states. On May 23, 1963, the Federal Trade Commission ordered Foremost to cease and desist from discriminating "in the price of fluid milk of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price." This order, which was premised on the Commission's finding of unjustified discrimination in the wholesale prices that Foremost charged in its sales of fluid milk in the Albuquerque, New Mexico, market, is before us for review.[1] The petition presents three questions for our consideration: (1) whether the Commission properly found a "purchase in commerce" within the meaning of the Act; (2) whether the Commission's inference of a probable competitive injury was supported by substantial evidence; (3) whether the order entered by the Commission was too sweeping in light of the nature of the particular activities which it found transgressed the Act.

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1. The price differentials were deemed violative of sec. 2(a) of the Robinson-Patman Act, 15 U. S. C. A. sec. 13(a), which provides in part as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *."

The advantageous prices were given by Foremost to Barber's, a retail grocery establishment which at the time of the hearing operated about eight stores in Albuquerque. The evidence indicates that, for a two-year period beginning in November 1959, Foremost granted a discount of 5% on its sales of fluid milk to Barber's stores, while it gave no similar price advantage to any of its independent grocer customers in the Albuquerque market.[2] The discount was originally granted when Barber stopped purchasing Foremost milk because in Barber's estimation Foremost was not "competitive." Without attempting to ascertain whether its competitors were also giving discounts or attempting to determine the amount of those discounts, Foremost granted Barber's a 5% cash rebate on its purchases of Foremost products.[3] The rebates were not discontinued until November 1961, and they amounted to cash payments from Foremost to Barber's of $7627.11 between their inception in November 1959 and April 1961, an average of well over $400 per month. The discriminations ceased only when Foremost fortuitously discovered that all of its competing distributors in the Albuquerque area had discontinued any form of price concessions.

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2. There was evidence that similar discounts were granted to two other retail grocery chains in Albuquerque, but the FTC held that these price advantages did not violate The Robinson-Patman Act. These findings by the Commission are not in issue in the petition for review.

3. Foremost's attempt to qualify these rebates under the "meeting competition" defense of sec. 2(b) of The Robinson-Patman Act, 15 U. S. C. A. sec. 13(b), or the "cost justification" defense of sec. 2(a) were unsuccessful. The FTC's conclusions with respect to these defenses are not challenged on appeal.

Our standard of review is clear. 15 U. S. C. A. §21(c). The facts found by the Commission if supported by substantial evidence, must be accepted, and it is not our function to weigh the evidence or consider the credibility of witnesses. Furthermore, reasonable inferences drawn from the facts by the Commission are not to be disturbed. See *e.g.*, *FTC* v. *A. E. Staley Mfg. Co.*, 324 U. S. 724, 760, 89 L. Ed. 1338, 1347 (1945); *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 78 L. Ed. 655 (1934); *FTC* v. *Pacific States Paper Trade Ass'n.*, 273 U. S. 52, 63, 71 L. Ed. 534, 538 (1927).

I. INTERSTATE COMMERCE

Foremost makes an initial attack on the jurisdiction of the Commission over the discounts in question, asserting that the evidence does not establish that "any of the purchases involved in such discrimination [were] in commerce" as required by section 2(a). It is conceded that the other operative jurisdictional prerequisite of section 2(a)—that the discriminating seller be "engaged in commerce"—is satisfied in the instant case.

When Congress enacted the Sherman Act, it intended to exercise its fullest powers under the commerce clause in proscribing all restraints of trade which "affect interstate commerce," but the Robinson-Patman Act is operative only in a more restrictive context. Nevertheless, whenever it can be demonstrated that one of the purchases involved in the discrimination was made in interstate commerce and that the person making the discrimination was engaged in commerce, there is jurisdiction to enter a cease and desist

order. The underlying principles applied in defining the term "in commerce" or "stream of commerce" under all three acts (Sherman, Clayton, and Robinson-Patman) are substantially identical. "The statute [Robinson-Patman] applies to all forms of interstate commerce, in whatever sense the commerce in question might be considered interstate." Toulmin's Antitrust Laws (1949), V. 2, §7.5, P. 45.

In the instant case, the record reveals that about 20% of the milk which Foremost supplied to its Albuquerque customers was produced in Colorado. Ordinarily, Foremost purchases its supply of raw milk from associations of dairymen, and it is shipped to the Foremost processing plant in Sante Fe, New Mexico.[4] There it is unloaded from the trucks, tested, standardized to a uniform butterfat content by the addition of other milk of a predetermined butterfat ratio, pasteurized, in some cases homogenized, and bottled. From the Santa Fe processing plant it is shipped in trucks to Foremost's Albuquerque distributing branch, where it is delivered to the customers for resale. One witness testified that a truck tank of raw milk is usually processed in less than an hour and that "in general the milk moves in and out the same day." The hearing examiner found that there was a "constant flow" of milk which originated outside of New Mexico, and that this milk remained in interstate commerce from its point of origin until delivery to Foremost's wholesale customers in Albuquerque.

4. The testimony in the record all related to Foremost's processing operations in Dallas, but it is not contended that its Santa Fe processing plant was operated in a different fashion.

We think the sales in the instant case were "in commerce" as that phrase is used in section 2(a) of the Robinson-Patman Act. It is well established that Congress may restrict uses of interstate commercial transactions which result in what it considered an undesirable effect on purely intrastate activities. Consistent with this aim of the Act in protecting against secondary-line injury, the courts have generally construed the word "purchase" without regard to its technical legal attributes, such as the point at which title passes. See *Olympia Food Market, Inc.* v. *Sheffield Farms Co.* (S. D. N. Y.) 1955 Trade Cas. 70442.[5] Likewise, courts have often applied the so-called "stream of commerce" doctrine in section 2(a) cases. See, *e.g., Standard Oil Co.* v. *FTC*, 340 U. S. 231, 95 L. Ed. 239 (1951); *Olympia Food Market, Inc.* v. *Sheffield Farms Co., supra, cf., Hardrives Co.* v. *East Coast Asphalt Corp.* (5 Cir. 1964) 329 F. 2d 868.

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5. Nevertheless, in cases in which only a secondary-line injury was shown, the courts have always carefully limited the application of the phrase "purchase in commerce" to those purchases directly involved in the discrimination. Either the purchase by the favored customer or one or more of his disfavored competitors must be made in interstate commerce. Therefore, it has been held that jurisdiction under the Robinson-Patman Act may not be established merely by showing that some of the discriminating company's sales are made across state lines. See Borden Co. v. FTC (7 Cir. 1964) 339 F. 2d 953; Jones v. Metzger Dairies, Inc. (5 Cir. 1964) 334 F. 2d 919; Willard Dairy Corp. v. National Dairy Prods. Corp. (6 Cir. 1962) 309 F. 2d 943, cert. denied, 373 U. S. 934 (1963). It has been suggested that a more expansive interpretation would be consonant with the statutory purpose behind regulation of injuries in the primary line of competition. See Moore v. Mead's Fine Bread, 348 U. S. 115, 99 L. Ed. 145 (1954); Borden Co., No. 7474, 3 CCH Trade Reg. Rep. ¶16776, at 21723 (1964) (dissenting opinion of Commissioner Elman).

In the instant case the milk passed in a steady flow from the farms in Colorado through the Santa Fe processing plant, where it underwent a rather negligible processing operation, which did not change its character appreciably, to the shelves of retail grocery establishments in Albuquerque.[6] Indeed, other courts of appeals have stated that, under the stream of commerce doctrine, milk produced in one state and processed and distributed in another state does not lose its interstate character because of standardization, and pasteurization. See *Universal Milk Bottle Service* v. *United States* (6 Cir. 1951) 188 F. 2d 959; *Pevely Dairy Co.* v. *United States* (8 Cir. 1949) 178 F. 2d 363.[7] Furthermore, we think the decision of the Supreme

6. Petitioner relies upon a number of cases in which raw materials used in the manufacture of a product had moved across state lines although all the sales in question were made in the same state in which the ultimate product was manufactured. See Central Ice Cream Co. v. Golden Rod Ice Cream Co. (7 Cir.) 287 F. 2d 265, *cert. denied*, 368 U. S. 829 (1961); Brosious v. Pepsi-Cola Co. (3 Cir. 1946) 155 F. 2d 99; Ewing-Von Allmen Dairy Co. v. C & C Ice Cream Co. (6 Cir. 1940) 109 F. 2d 898. In contradistinction to these cases, the raw milk which arrived each day from outside New Mexico was not altered materially by the processing in Santa Fe, and the milk was not warehoused for any appreciable length of time before shipment. We feel this serves as an adequate distinction between these cases and the instant one.

7. Foremost urges that these cases should not persuade us, since they involved indictments under the broader terms of section 1 of the Sherman Act, where the Government need only demonstrate that the defendant's activities had an effect on interstate commerce. This observation is certainly apropos to the *Universal Milk Bottle* case, where the indictment alleged that the fixing of prices of milk sold by defendants in Cincinnati had the effect of reducing the volume of milk which defendants purchased from out of state. The court based its decision squarely on the ground that the indictment alleged an effect on interstate commerce, although it noted that the case presented a stronger factual setting for establishing the stream of com-

Court in *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 95 L. Ed. 239 (1951) requires the conclusion that the sales in the instant case were in interstate commerce. In that case, which was also brought under section 2(a) of the Robinson-Patman Act, gasoline produced in Kansas and refined in Indiana was shipped to Michigan, where it was stored in tanks before delivery to Standard's customers in Michigan. It was established that the demands of the Michigan territory were fairly constant. The Court, applying the stream of commerce doctrine, held that these deliveries to individual customers in Michigan constituted sales in interstate commerce, even though the gasoline was stored for some time prior to distribution to retailers.

In the case before us, the fluid milk undergoes a rather negligible processing,[8] in general moving in a constant flow from the Colorado Dairy farms to meet the fairly predictable demands of the retail grocers in Albuquerque. This processing no more interrupts the flow of commerce

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merce doctrine than that in *Standard Oil Co.* v. *FTC*, discussed *infra*. See also United States v. Sheffield Farms Co. (S. D. N. Y. 1942) 43 F. Supp. 1. However, the *Pevely Dairy* indictment contained no allegation that the flow of milk across state lines was reduced in any fashion. It only asserted that the defendant dairies had conspired to fix the wholesale and retail prices at which fluid milk was resold in Missouri and that this restraint had the effect of stabilizing the milk prices in St. Louis of milk which was produced outside of Missouri. In upholding the indictment, the court necessarily held that the milk remained in interstate commerce until it reached the ultimate consumers.

8. The term "processing", as used in section 2(e), has been defined as "a mode of treatment of materials to be transformed or reduced to a different state or thing." Corn Prods. Ref. Co. v. FTC, 324 U. S. 726, 744, 89 L. Ed. 1320, 1335 (1945). We do not have that degree of product transformation in the instant case.

that the temporary storage of the gasoline in the *Standard Oil* case. See also *Olympia Food Market, Inc.* v. *Sheffield Farms Co., supra,* which upheld a complaint premised on section 2(a) violations on the ground that it showed that defendant was "engaged in a continuous stream of commerce in securing milk outside the State of New York for sale in the State of New York to plaintiff and to competitors." On the basis of the foregoing authorities, we conclude that Foremost's shipments of milk to its Albuquerque customers had such significant interstate incidents that they constitute purchases in commerce sufficient to furnish the FTC with a jurisdictional basis for the application of section 2(a) of the Robinson-Patman Act.

II. COMPETITIVE INJURY

Section 2(a) of the Robinson-Patman Act seeks to protect against two types of injuries which may result from the discriminatory pricing policies of an interstate seller. The probability of a general injury to competitive conditions in the market in which the seller or the purchaser sells his product will support a cease and desist order or afford an aggrieved party the basis for an action in damages. An injury of this broad nature is more prevalent in primary-line cases, as where a dominant seller uses discriminatory pricing policies to enhance its market position and therefore diminish the general vigor of competition or to increase the concentration of market power in the industry. However, the act also protects the victim of unwarranted price differentials from a more narrow type of injury by prohibiting such differentials where the result may be substantially to

"injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

Foremost urges that the Commission's inference of this latter type of injury in the instant case was not supported by substantial evidence in the record. Specifically, Foremost complains that there was no evidence of underselling by its favored customers and no evidence that the unfavored customers actually engaged in substantial competition with any of Barber's stores during the period when the discounts were in effect. Essentially, the Commission takes the position that, if it can show a substantial price differential which is sustained over a significant period of time in a business where profit margins are low and competition keen, it is proper to infer that an injury to competition with the favored purchaser is probable. Foremost argues that the Commission's approach establishes a virtual *per se* rule with respect to proof of a secondary-line injury.

The evidence in the instant proceeding is admittedly meagre. It was proved at the hearing that Foremost granted a discount to the Barber chain on its purchases of fluid milk over a period of two years, and that in the first three-quarters of this period the rebates involved more than $7600 cash advantage to Barber on total milk purchases of $153,361.16. It was also shown that Foremost did not offer comparable price advantages to its independent customers in the Albuquerque area. The evidence further indicates that Barber's did not utilize the cash advantage it received from Foremost to reduce the retail price of its milk prod-

ucts. There is also testimony from which the Commission could infer what are well-known facts—that profit margins in the sale of fluid milk are relatively low and that competition in the sale of milk at retail is quite lively.[9]

Furthermore, the record reveals that Conniff, who was an independent customer of Foremost, competed directly with one of Barber's stores during the last month in which the discounts were in effect. He testified that at the time the price concessions were initiated he bought Foremost milk at forty-five cents a half gallon and sold it at fifty-two cents. Later Conniff felt it necessary to reduce the resale price of his milk by three cents a half gallon because "chains were selling at fifty-two and giving double stamps on milk." It was established that double trading stamps were the approximate equivalent of a five per cent reduction in the resale price of a half gallon of milk.[10] Con-

9. The hearing examiner found as follows:

"Milk is a staple, highly standardized food item sold by virtually all food retailers, and the grocery stores in Albuquerque which received discounts from respondent competed to some degree with stores which did not receive any discount. Profits made by Albuquerque grocers on milk are low. At least one grocer grossed 4 cents, or 8.16 percent, per half-gallon profit; the list price was 45 cents and later 43 cents and a 5 percent discount was therefore significant. Competition is keen among retailers, and margins of profit and mark-ups are small. A lower price to some but not all competing retail stores in this city would normally be expected to hinder competition between them. At least two of the chains shown to have been favored did not resell milk below their competitors' prices, but the discounts were sufficiently large to give them a competitive advantage."

10. However, there was no testimony directly establishing that Barber's utilized the rebates it obtained from Foremost to offer double trading stamps on Foremost milk, and the Commission apparently did not rely upon such an inference.

niff also testified that his grocery customers came from all over Albuquerque and that if he were able to offer a three to five cent reduction on the price of a half gallon of milk, it would be sufficient to draw customers into his store and divert them from his competitors.

In *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 92 L. Ed. 1196 (1948), the Supreme Court commented significantly on the quantum of proof necessary to establish a secondary-line injury in a section 2(a) case. While the price differentials in that case were part of a fixed pricing system which had been maintained over a long period, the Court asserted that a showing of substantial price differences furnished a sufficient basis for inferring a "reasonable possibility"[11] of competitive injury. The Court said at 50:

> "The Commission here went much further in receiving evidence than the statute requires. It heard testimony from any witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue—injury to competition. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that

11. Perhaps it should be noted that in the instant case the FTC applied a standard of probable injury rather than the "reasonable possibility" standard articulated in *Morton Salt*. Apparently, the Commission applies a standard of probability as a matter of course, although the distinction between the two standards may be more apparent than real.

competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.'"[12]

While we adhere to the proposition that price discriminations are not *per se* illegal,[13] we feel that we must defer to the Commission the task of drawing the inference of a probable injury to competitors so long as that inference is supported by a reasonable quantum of evidence in the record. Where the evidence indicates an industry in which competition in the secondary line is keen, profit margins are low, substantial price differentials have been offered, and group or aggregate buying has been prevalent, the FTC's inference of probable competitive injury has been upheld even in the face of direct testimony by non-favored customers that the price discrimination had not resulted in an injury to their businesses. See *Whitaker Cable Corp.* v. *FTC* (7 Cir. 1956) 239 F. 2d 253, *cert. denied* 353 U. S. 938 (1957); *E. Edelmann & Co.* v. *FTC* (7 Cir. 1956) 239 F. 2d 152; *Moog Industries, Inc.* v. *FTC* (8 Cir. 1956) 238 F. 2d 43, *aff'd on other grounds,* 355 U. S. 411 (1958). Indeed, it seems well-established that where the record indi-

12. Recently the Court reaffirmed this approach in FTC v. Anheuser-Busch, Inc., 4 L. Ed. 2d 1385, 1395 n. 21 (1960).

13. Indeed, the Commission itself has required rather detailed evidence of a competitive injury where unfavored customers are required to sell at preticketed prices and are engaged in different businesses from the favored buyers, see W. F. Schrafft & Sons Corp., 3 CCH Trade Reg. Rep. ¶16882 (May 14, 1964), or where profit margins are high, see Fred Bronner Corp., 1960-61 CCH Trade Reg. Rep. ¶29125 (1960).

cates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate saving that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged.[14] It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field or it can enable him to offer customer-attracting services which will give him a substantial advantage over his competition. In the instant case, there was evidence that such services were made available by some grocery chains, although the Commission did not conclude that the offering of bonus trading stamps resulted directly from the cash rebates in question.

Foremost relies on the recent case of *American Oil Co.* v. *FTC* (7 Cir. 1963) 325 F. 2d 101, *cert. denied,* 12 L. Ed. 2d 498 (1964), in which the petitioner granted short-lived price concessions to customer service stations in one area while similar concessions were not granted to customers in a neighboring area which competed to some extent with customers in the favored area. The concessions were granted for a 17-day period in the heat of a gasoline price war. Although the evidence showed an actual loss of

14. See generally Edwards, The Price Discrimination Law, 518-45 (1959); Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 40-49 (rev. ed. 1953).

sales by the customers located in the non-favored area, under the circumstances of the price war the court found that there was no basis for inferring a causal connection between the injury and the price discriminations. Nor was there evidence of a substantial impairment of the ability of the unfavored dealers to compete. This case is clearly distinguishable from the one under consideration, particularly in view of the duration of the discriminations in the instant case and the context in which they were made. However, the opinion certainly indicates that the courts have not adopted a *per se* approach to section 2(a) cases.

There is no merit in Foremost's contention that there is a lack of evidence that any of its unfavored customers other than Conniff competed with Barber's. It is true that most of Barber's stores are located in the eastern portion of Albuquerque, while most of Foremost's independent customers are situated in the western part of the city. With the exception of store #4, none of the Barber's stores are located in close proximity to the unfavored customers of Foremost. Barber's store #4 had only been opened for one month when the discriminatory pricing policies were discontinued by Foremost. Although there is some warrant in that situation for inferring a probability of competitive injury had the rebates continued in effect, the Commission was not so restricted. It seems evident that the FTC viewed the entire Albuquerque area as the market in which competitors suffered probable injury. In the grocery business, where competition is keen and

profit margins are low, customers may often drive to relatively distant retail outlets if significant price differences or alluring bonuses are made available. This is borne out by the testimony of Conniff that his customers were not restricted to those living in the immediate neighborhood of his store.

We think the tone set by the Supreme Court in the *Morton Salt* case requires that we affirm the FTC's inference of a probable injury to competition in the circumstances and in light of the industry setting.[15] As we noted earlier, some deference must be made to the Commission's expertise in this area as long as its conclusions are supported by substantial evidence.

III. PROPRIETY OF THE ORDER

Foremost attacks the entry of a cease and desist order in this case on the ground that no pattern of violations was indicated by the evidence. It is contended that the Commission abused its discretion in entering an order at all, and, in the alternative, that if any order was proper it should have been directed only to the isolated violation

15. In this connection, we call attention to the following description in FTC v. Morton Salt, 334 U. S. at 49; 92 L. Ed. at 1205:

> "There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

which was found to exist. The FTC may exercise a broad discretion in determining the propriety and scope of an order in a particular case, a discretion which will only be set aside by a reviewing court "where the remedy selected has no reasonable relation to the unlawful practices found to exist." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 473, 96 L. Ed. 1081, 1087 (1952). We cannot say that the order under consideration was unreasonable in the circumstances. To limit the Commission to the entry of orders which are directed only to the specific violation found to exist would be not only unrealistic but also would frustrate the purposes of the Robinson-Patman Act. It should be made clear, however, that the order does not deprive Foremost of its right to offer price differentials which fall within the scope of the traditional defenses in sections 2(a) and (b) of the Act.

The order is AFFIRMED.

Appendix B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20726

FOREMOST DAIRIES, INC.,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order of the Federal Trade Commission

Before TUTTLE, Chief Judge, and GEWIN, Circuit Judge, and McRAE, District Judge.

This cause came to be heard on the petition of Foremost Dairies, Inc., for review of an Order of the Federal Trade Commission issued on May 23, 1963, in Docket No. 7475, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Order of the Federal Trade Commission in this cause be and the same is hereby affirmed.

"Per Gewin, Circuit Judge"

July 14, 1965

Appendix C

Final Decree Enforcing Order to Cease and Desist

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20726

FOREMOST DAIRIES, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before TUTTLE, Chief Judge, and GEWIN, Circuit Judge, and McRAE, District Judge.

By the Court:

Foremost Dairies, Inc., having filed in this Court on July 26, 1963, a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent herein, on May 23, 1963; and respondent having thereafter certified and filed herein a transcript of the record in the proceeding upon which the order to cease

Appendix C
Final Decree Enforcing Order to Cease and Desist

and desist was based; and the matter having ben heard by this Court on briefs and oral argument on October 27, 1964; and the Court having rendered its decision and opinion on July 14, 1965, affirming the aforesaid order to cease and desist;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prayer contained in the said petition to set aside the said order be, and it hereby is, denied; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, affirmed in its entirety; and that petitioner be, and it hereby is, commanded forthwith to obey said order and to comply therewith.

ENTERED: Aug 5 1955

FILED
5th day of August 1965
by CLARA R. JAMES
Clerk of the United States Court of Appeals

Appendix D

Order

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20726

FOREMOST DAIRIES, INC.,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of an Order of the Federal Trade Commission

Before TUTTLE, Chief Judge, and GEWIN, Circuit Judge, and McRAE, District Judge.

ON CONSIDERATION OF THE MOTION of Petitioner for stay of final decree in the above numbered and entitled cause, to enable Petitioner to apply for and to obtain a writ of certiorari from the Supreme Court of the United States,

Appendix D — Order

It is Ordered that the final decree issued to the Secretary of the Federal Trade Commission at Washington, D. C., on August 5, 1965, be stayed to and including October 5th, 1965, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed.

It is Further Ordered that the Stay shall be terminated upon the filing of a copy of an Order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(Original Filed September 7, 1965)